United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1581

ORIGINAL

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P/S

In The

United States Court of Appeals

For The Second Circuit

ROBERT R. FELTON and EDWARD J. EGAN,
Plaintiffs-Appellants,

vs.

WALSTON AND CO., INC., JAMES NISSAN MARINE MIDLAND BANKS, INC., MARINE MIDLAND BANK-WESTERN, MARINE MIDLAND BANK-NEW YORK, MARINE MIDLAND BANK-ROCHESTER, MARINE MIDLAND BANK-CENTRAL, MARINE MIDLAND BANK-SOUTHERN, MARINE MIDLAND BANK OF SOUTHEASTERN NEW YORK, N.A., MARINE MIDLAND BANK-NORTHERN, MARINE MIDLAND BANK-EASTERN NATIONAL ASSOCIATION, MARINE MIDLAND BANK-CHAUTAQUA, NATIONAL ASSOCIATION, MARINE MIDLAND-TINKER NATIONAL BANK, INC., DRYFUS-MARINE MIDLAND, INC., JOEL BROWNSTEIN, 3 I CO./ INFORMATION INTERSCIENCE, INC.,GERALD L. BRODSKY, MAURICE BRODSKY, ARTHUR W. ELIAS, MARVIN S. RIESENBACH, MARVIN SCHILLER, IRVING H. SHER, STICHTING EXCERPTA MEDICA (EXCERPTA MEDICA FOUNDATION), MEDISCHE REFERANTAN, (EXCERPTA MEDICA) N.V., INFONET (EXCERPTA MEDICA-RESCONA) N.V., ELTRAC (INFONET) N.V., PETER WARREN MAIN LAFRENTZ AND CO., FRED VON EUGEN, S. KIN KESSLER AND GERALDINE KESSLER,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF

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POINT I

THE LOWER COURT COMMITTED CLEAR AND REVERSIBLE ERROR BY FAILING TO HEED THE MANDATE OF RULE 12 (b) FRCP.

There is no merit to Marine Midland's argument* that Rule 12 (b) "would permit any plaintiff to circumvent pleading requirements by flooding the District Court with his own affidavits and other papers" (MMbr 14). The lower Court had the option to exclude matters outside the pleading, which option was not exercised. On the contrary, Judge Bonsal accepted and agreed to read plaintiffs' exhibits (547a)** and in his opinion never excluded these matters presented by plaintiffs. (555a-563a)

The Advisory Committee's Note to the 1948 amendment of FRCP explains thus:

> " The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12 (b) (6) extraneous material

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*Appellees' Marine Midland (and Brownstein)brief hereinafter referred to as MM br.

**All numerical references are to Appellants' Appendix.

> may not be considered if the Court excludes it, but that if the Court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56." (emphasis added)

By suggesting that the "testimony, exhibits and affidavits presented to the Court on other motions does not imply that they were considered on the motion to dismiss" (MM br 14), Marine Midland conveniently "overlooked" plaintiffs' memorandum presented to the Court below specifically in opposition to defendants' five (5) motions to dismiss, which memorandum contained excerpts of defendants' testimony and exhibits denoted "A TO F" inclusive*. Additionally, this opposition memorandum incorporated plaintiff's affidavit dated November 8, 1973 (368-374a), plaintiff's affidavit dated November 11, 1973 (377a-391a) and exhibits (392a-421a).

Had all the defendants combined all their

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*Exhibits "A-1,2,3" (256-257a, 258a, 264a), were specifically directed to plaintiffs' cause of action against 3I Co. and Main Lafrentz. Exhibit "B" was a copy of plaintiffs' amended complaint. Exhibits "C,D, E" (403a, 404a, 411a) were specifically directed to plaintiffs' cause of action against 3I Co., Brodsky, Brownstein, Marine Midland, Nissan and Walston. Exhibit "F" (402a) was specifically directed to plaintiffs' cause of action against 3I Co., Elias, Riesenbach, Schiller and Sher.

motions to dismiss with motions in the alternative for summary judgment, there could be the possible argument that the lower Court accepted these aforesaid exhibits, excerpts of defendants' testimony and affidavits for the summary judgment motions. However, all defendants have not moved for summary judgment and this argument will not avail defendants. Those aforesaid matters accepted by the Court were specifically directed by plaintiffs in opposition to all five motions to dismiss as well as to the one (1) Main Lafrentz alternative motion. Thus, the lower Court in failing to reach the Main Lafrentz summary judgment motion in no way excluded all these aforesaid matters addressed to all the other defendants' motions to dismiss.

In an attempt to show that plaintiffs presented and the lower Court agreed to read the aforesaid exhibits only as to the Main Lafrentz motion, appellees Riesenbach, Elias and Sher, in their brief* improperly quoted out of context certain portions of the oral argument. Their brief, (RES br 10) carefully

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*Appellees Riesenbach, Elias and Sher brief is hereinafter referred to as RES br.

edited out the beginning sentence of plaintiff's argument paragraph wherein plaintiff stated that his argument as to genuine issues of fact "tie[d] into something argued by Marine Midland." (547a lines 8 and 9) and appellees also carefully omitted plaintiff's argument relating to Exhibit "C" (403a) and Exhibit "D" (404a) as well as excerpts of defendants' testimony (548a lines 3-25, 549a lines 2-3). Had these defendants completely and fairly quoted this oral argument they would have no grounds to assert that these exhibits only applied to the Main Lafrentz summary judgment motion.

There is nothing inconsistent in appellants' statement that:

> " [I]t must be further said that the lower Court determined these Rule 23 criteria in the same manner as it erroneously determined defendants' motions to dismiss, i.e., in vacuo, by merely reading the complaint." (emphasis added) (App br 53).

The tortured interpretations these appellees chose to give this aforesaid perfectly simple sentence is typical of the "care" they took to summarize their versions of the case and prior events (MM br 14 footnote, RES br 14, footnote). In particular, Marine Midland quoted the sentence out of context so as to

omit the all important adverb "erroneously" (MM br 14) and thus to substantiate their misinterpretations.

The case of Duane v. Altenburg, 297 F. 2d 515, 518 (7th Cir. 1962) cited by appellees (RES br 11, ML br 32*) is clearly distinguishable from this instant case on appeal. In Duane, plaintiffs had appealed the Court's order mistakenly assuming that the Court had granted summary judgment. However, the appellate Court, in its decision, page 518, found defective affidavits which "do not qualify as a basis for summary judgment" and "the absence of the actual entry of a judgment for defendants", concluding that both plaintiffs and defendants were mistaken, that although the record was unclear, the lower Court did not grant summary judgment. In contrast to Duane, the entire record of this instant case on appeal is quite clear. There were no mistaken assumptions by plaintiff and defendants. Judge Bonsal granted the defendants' motions to dismiss and in so doing clearly stated in his opinion that he did not reach the Main Lafrentz summary judgment motion (563a). The oral argument shows that he actually accepted matters outside the pleadings (547a, 548a) and in his opinion these matters were never excluded. (555a-563a)

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*Main Lafrentz brief is hereinafter referred to as ML br.

The lower Court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. (Carter v. Stanton, 405 U.S. 669, 670, 92 S. Ct. 1232 [1972]).

POINT II

(a) IF THE LOWER COURT HAD PROPERLY FOLLOWED THE MANDATE OF RULE 12 (b), THEN DEFENDANTS' MOTIONS SHOULD HAVE BEEN DENIED UNDER RULE 56.

The proof demonstrated in the matters presented to the lower Court required the denial of defendants' motions under Rule 56. Of all these appellees, only Main Lafrentz has attempted to meet its burden of proof under Rule 56 and Main Lafrentz has failed.

The Supreme Court in Poller v. Columbia Broadcasting System, 1962, 82 S. Ct. 486, 491, 368 U.S. 464, 473, 7 L. Ed. 2d 458, stated that summary judgment requires the record to be "quite clear what the truth is". The Court further said:

> " Trial by affidavit is no substitute for trial by jury which so long has been the hall-mark of 'even-handed justice'."

Main Lafrentz obviously wanted trial by affidavit and did not allow for "even-handed justice"

in moving for a protective order to stay plaintiffs from deposing Main Lafrentz personnell concurrent with its motion for summary judgment (277a).

It is respectfully submitted that the Main Lafrentz brief contains a mass of self-serving conclusions that fly in the face of the truth and are effectively controverted by plaintiff's affidavit dated November 8, 1973 (287a-295a) and appellants' brief (app. br 26-30).

Appellees have not met their burden or proof under Rule 56. There are genuine issues as to material facts. This case must go to trial.

(b) DEFENDANTS HAVE NOT DISPUTED THE FACT THAT THEY DID NOT RAISE THE ISSUE OF RULE 9 (b) IN FRAMING RESPONSIVE ANSWERS TO PLAINTIFF'S PRIOR COMPLAINT.

The record is clear and is undisputed by defendants that plaintiff's lengthy prior complaint herein was answered by defendants and that no defendant raised the issue of Rule 9 (b).

Ergo, defendants waived their right to challenge this short and concise version of the lengthy prior complaint, served by the directive of Judge Bonsal.

(c) PLAINTIFFS' COMPLAINT CONTAINS THE FACTS, FIGURES AND EVENTS SUFFICIENTLY DETAILING THE FRAUD OF THESE DEFENDANTS.

Plaintiffs' instant complaint contains the facts, figures and events detailing the fraud of these defendants. There is absolutely no similarity between the complaint herein and a disgruntled stockholder's complaint in Shemtob v. Shearson, Hamill and Co., 448 F. 2d 442, 445, (1971) wherein this Court stated:

> "Thus plaintiffs' [Shemtob] claim is nothing more than a garden-variety customer's suit against a broker for breach of contract---."

The complaint in Frazier v. Stellar Industries, Inc., Civ. No. 72-2829-MLL, C.D. Cal. 1973* is also totally dissimilar from plaintiffs' instant complaint. Firstly, the Frazier complaint did not allege that the accountants certified the figures contained in Stellar's proxy, whereas plaintiffs have alleged

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*Not being content with merely quoting Frazier, Main Lafrentz gave Judge Bonsal a copy of the Frazier memorandum opinion and has indicated that it intends to supply this Court with additional copies. (ML br 33) Similar to their tactics of forcing trial by affidavits, and to prove their point, Main Lafrentz baldly stated "[R]ecently this same rationale [Frazier] was applied in Sloan v. Canadian Javelin, Ltd.,CCH Fed. Sec. L. Rep. ¶94, 579, (S.D.N.Y. May 30, 1974)"(ML br 34). What Main Lafrentz carefully omitted to state in its brief was that Judge Bonsal also wrote the decision in Sloan.

that Main Lafrentz did certify the financial statements in 3I Co. 1970 Annual Report. Furthermore, Judge Lucas emphasized in his opinion in Frazier, page 24, that:

> " The [Frazier] complaint's sole factual allegation is that they were accountants and auditors for Stellar." (emphasis added)

Contrasting to the facts of the common course of fraudulent conduct of these defendants detailed in plaintiffs' instant complaint was the complaint in Segal v. Gordon, 467 F. 2d 602, 608 (1972). This Circuit in reviewing that complaint stated:

> " Plaintiff's complaint and his proposed amended complaint do not meet the requirements of Rule 9(b). The first complaint was obviously filed on the basis of little investigation or research.---Plaintiff's conspiracy claims are obviously founded more on an examination of Rule 10 b-5 than on an investigation of the facts of the alleged fraud."

In a footnote to this portion of the Segal decision, page 608, footnote 8, this Court stated:

> Compare the investigation and research done by Mr. Brilliant and Mr. Rockler in Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 368-372, 86 S. Ct. 845, 15 L. Ed. 2d 807 (1966).

Plaintiffs respectfully request that this Court consider the investigation and research performed

by plaintiff Felton. Numerous days were spent at the offices of the Securities and Exchange Commision in New York City and also in Washington, D.C. Hundreds of SEC documents were reviewed and photocopied by plaintiff Felton.* Based on this investigation and research, plaintiff Felton prepared the complaint filed August 14, 1973. Ironically although this complaint was deemed sufficiently particularized by the defendants**, it was considered too "lengthy" by Judge Bonsal. (app br 7-8)

The Supreme Court in Surowitz v. Hilton Hotels Corp., (supra), page 373, in reversing the dismissal of the complaint stated:

> " We cannot construe Rule 23 or any other one of the Federal Rules as compelling Courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of carefully investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which

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*Felton deposition, pages 147-148.
**All defendants answered this prior complaint.

> common-law pleaders could set to prevent unsophisticated litigants from ever having their day in Court. If rules of procedure work as they should in an honest and fair judicial system, they do not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23 (b) like the other civil rules was written to further not defeat the ends of justice. The serious fraud charges here, which of course has not been proven, is clearly in that class of deceitful conduct which the federal securities laws were largely passed to prohibit and protect against." (emphasis added)

What more can be said? Obviously favoring form over substance, the lower Court dismissed plaintiffs' instant complaint which is actually a short and concise version of the prior complaint which defendants deemed sufficiently partiularized to answer.

POINT III

MARINE MIDLAND'S CONTENTIONS IN SUPPORT OF JUDGE BONSAL'S DETERMINATION OF PLAINTIFFS' RULE 23 MOTION ARE UNFOUNDED.

On the oral argument Marine Midland by its counsel William Willis misled Judge Bonsal by deliberately stating that plaintiff "Felton never saw" Marine Midland's report. (538a, line 4)

Now, in its brief, Marine Midland has admitted that Felton saw the report but argues that he saw it after his last purchase of stock. (MM br 18) What Marine Midland has also omitted to state was that Felton made his last purchase of 3I Co. stock in reliance on Nissan's disclosure of the report.(app br 37, 148a-149a)

As Marine Midland well knows James Nissan was no ordinary stockbroker. Nissan was a vice-president of Walston and Co. Inc.(a "market-maker" and dealer in 3I Co. stock). Nissan was also a 3I Co. stock holder, a 3I Co. warrant holder, a 3I Co. creditor and a co-guarantor of 3I Co. bank loans (app br 39) 3I Co. was known on Wall Street as "Nissan's stock" (151a). Significantly Nissan was Brownstein's confidante (app br 20-21) and most significantly for approximately three months following Brownsteins' receipt of Brodsky's self-serving letter of disavowal and error (app br 24) only Nissan knew of its existance. Nissan in his involvement with 3I Co. and these defendants in their common course of fraudulent conduct was no ordinary stock broker. Accordingly the cases cited by Marine Midland as to stockbrokers are not in point. (MM br 18)

In its argument Marine Midland totally

omitted any reference to co-plaintiff Edward Egan's claim. Prior to Egan's claim, Marine Midland and Brownstein had (1).denied that Brownstein's report was ever delivered by any employee or officer to any member of the investigating public* and (2).labelled the report "for company use only".** Egan gave the lie to this in that a Marine Midland trust officer personally delivered a copy of the report to his office. (299a-300a), thus totally destroying Marine Midland's defense.

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*Paragraph No. 44 of plaintiff's prior complaint (41a)

> "Defendant Marine Midland, by its officers, employees and/or agents mailed, delivered and/or distributed copies of the aforesaid Report to other firms, banks and/or brokerage houses in the business and investment community."

Paragraph No.16 of Marine Midland's Answer (95a)

> "Denied the allegations contained in paragraph 44."

**Paragraph No. 38 of plaintiff's prior complaint (41a)

> "Defendant Brownstein informed defendant Nissan that he was preparing the aforesaid Report concerning defendant 3I Co."

Paragraph No. 21 of Brownstein's Answer (87a)

> "Admits the allegations contained in paragraph 38, and avers that Brownstein informed defendant Nissan (i) that he was preparing a report concerning defendant 3i Company/Information Interscience, Inc. ("3i") and (ii) that said report was for use by Brownstein's employer only."

Marine Midland has blown out of proportion plaintiff Felton's vigorous discovery efforts. Nit-picking and misstatements have been joined to attempt to show lack of familiarity with the so-called "nuances" of federal practice. Actually with steam-roller tactics Marine Midland unfairly gained priority in deposition;i.e., (1) by refusing to adjourn plaintiff's deposition without written stipulation and then unilaterally converting this stipulation into a Court order (21a-22a), (2) pressing a default on plaintiff when in fact other defendants had requested an adjournment, (80a) (3) failing to notice all defendants (100a-101a) and (4) unilaterally submitting a proposed order to the Court without setting a definite date therein for Brownstein's deposition (166a-167a).

The proof developed by plaintiff Felton especially in his questioning of Nissan and Brownstein are consonant with Judge Bonsal's finding of "Felton's experience and skill in negligence litigation" and contrast with the Court's succinct statement in O'Connor v. G.C.A. Corp. [1973] CCH Fed Sec. L. Rep ¶94, 057 at p.94, 255 (S.D.N.Y. 1973) "But, Mr Castelloe, is not a litigator."

Appellants have made a point in their

brief of the unfairness of Marine Midland's quoting Felton's testimony out of context (app br 59). Nevertheless, Marine Midland has repeated this unfair practice to basely distort Felton's motives in instituting this action. (MM br 22)*

Marine Midland was given a detailed list of plaintiffs' substantial losses.** These substantial losses are in sharp contrast with the minimal claims of the plaintiffs in the cases cited by Marine Midland (MM br 21-22). For example, plaintiff in Cotchett v. Avis Rent a Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972) sued on behalf of persons who paid $1.00 surcharge in connection with automobile rentals against car rental agencies (in violation of the Sherman Anti-Trust Act and Clayton Act) estimating the Class to number 500,000 and in his brief expanding the class to 1,500,000. Since the individual claim of each member of the proposed class was at most only $1.00, it was obvious that Cochett's sole consideration was an anticipated attorney's fee. In Shields v. Valley National Bank of Arizona, 56 F.R.D. 448, 450-451 (USDC, D. Ariz) and Kriger v. European Health Spa, Inc.,

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*Felton's testimony is quoted in its entirety at app br 59-62

**Felton sustained a loss of $14,448. (app br 38)
Egan sustained a loss of $2,200 (299a-300a)

56 F.R.D. 104, 106 (D.C. Wisc) plaintiffs sued under the Truth in Lending Act, which Act provided a specific remedy of minimal damages of $100 plus costs and reasonable attorney's fees, without proof of actual damages. The size of the proposed class both in Shields and Kriger, the horrendous punishment to defendants with only minimal recovery for each proposed class memeber, point to obvious motivation, as in Cotchett, of the anticipated attorney's fee. Judge Marvin Frankel, a leading proponent of Rule 23, was quoted in Shields* as concluding "that the allowance of a class action---was essentially inconsistent with the specific remedy supplied by the Truth in Lending Act.---"

Unfortunately those investors wronged by defendants herein who are members of the proposed class have no redress other than this class action. Furthermore, the extent of plaintiffs' substantial losses has caused this vigorous prosecution of their action and the facts of fraud developed herein. As aptly stated by C. Wright and A. Miller, Federal Practice and Procedure, §1767 at page 638:

> " In short, the personal or financial involvement of the representatives continues to be a factor that should be considered under Rule 23 (a)(4)."

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*Shields (supra) at page 450.

It is submitted that Marine Midland's contentions in support of Judge Bonsal's determination of plaintiffs' Rule 23 motion are unfounded.

CONCLUSION

It is submitted that the decisions below should be reversed, and the cause should be remanded for further proceedings.

Dated: Mineola, New York
October 21, 1974

Respectfully submitted,

ROBERT R. FELTON
Attorney for Plaintiffs and
Plaintiff pro se.

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURY OF APPEALS: SECOND CIRCUIT

FELTON,
Plaintiff-Appellants.

against

WALSTON, et al,
Defendants-Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 21st day of October 1974 at *

deponent served the annexed Reply Brief upon

*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 21st day of October 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

* Breed, Abbott & Morgan- 1 Chase Manhattan Plaza-NY
* Sullivan & Cromwell- 48 Wall St., New York
* Leon, Weill & Mahoney- 261 Madison- New York
* Anderson, Russell & Kill- 630 Fiftha Ave., New York
* Shea Gould Climenko & Kramer- 330 Madison Ave., NY
* Kaye, Scholar, Fierman, Hays & Handler- 425 Park Av